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June 25, 2004

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

Re: ***Notice of Ex Parte – CC Docket Nos. 93-193, 94-65, and 94-157***
Verizon Telephone Companies Petition for Reconsideration,
“In the Matter of Stale or Moot Docketed Proceedings”

Dear Ms. Dortch:

On June 24th, 2004, Mike Senkowski, of Wiley Rein & Fielding, LLP, and I, the undersigned, on behalf of SBC Telecommunications, met with Bryan Tramont, Chief of Staff to Chairman Michael K. Powell, Christopher Libertelli, Senior Legal Advisor to Chairman Powell, John Rogovin and Linda Kinney of the Office of General Counsel, and Tamara Preiss of the Wireline Competition Bureau, to discuss the above referenced proceedings. During the course of the meeting, we reiterated SBC’s legal positions as it reflected in its previous filings. SBC utilized the attached document as the basis for discussion.

Pursuant to 1.1206 of the Commission’s Rules, this letter is being filed electronically with the Commission.

Sincerely,

/s/ Gary L. Phillips

Attachment

cc (via electronic mail):
Bryan Tramont
Christopher Libertelli
John Rogovin
Linda Kinney
Tamara Preiss

“RAO 20” TARIFF INVESTIGATION

I. *The Commission’s rules did not permit, much less require, LECs to deduct accrued OPEB liabilities from their rate bases.*

- The Commission’s rate base rules in effect in 1996 — 47 C.F.R. §§ 65.800-65.830 — gave clear and explicit direction on how LECs were to calculate their rate base and, in fact, established the *precise* formula for doing so:
 - § 65.800: “[t]he rate base *shall consist of* the interstate portion of the accounts listed in § 65.820 . . . , minus any deducted items computed *in accordance with* § 65.830.”
- The Commission has noted on *three* separate occasions that its rules could not be interpreted to require deduction of OPEBs
 - *1996 Rescission Order* ¶ 25: After noting that the Commission’s rules “define explicitly those items to be included in, or excluded from, the rate base,” the Commission held that the Bureau had exceeded its authority when it required LECs to deduct OPEBs from the rate base because the Bureau had “directed [an] exclusion[] from . . . the rate base for which the Part 65 rules *do not specifically provide*.”
 - Although the Commission stated that it “base[d] [its] action solely on procedural grounds, and render[ed] no decision on the substantive merits of the ratemaking practices at issue,” *RAO 20 Rescission Order* ¶ 27, the Commission was not suggesting that under its existing rules it could require deduction of OPEBs. Instead, the Commission was explaining that it had not prejudged the substantive issue it was simultaneously teeing up in the NPRM: whether deduction of OPEBs *should be* required prospectively. That this is the only possible reading of the statement at issue is clear from the NPRM that accompanied the *Rescission Order* and (2) the *1997 Reconsideration Order*.
 - In the NPRM issued with the *Rescission Order*, the FCC made clear that its rules *could not* be read to require removal of accrued OPEB liabilities from the rate base: ***Under our current Part 65 rules, unfunded accrued pension costs recorded in Account 4310 are removed from the rate base, although other items recorded in Account 4310, such as accrued OPEB liabilities, are not removed from the rate base.*** (Emphasis Added).
 - In its *1997 Reconsideration Order*, the Commission reiterated the point. In rejecting MCI’s argument that section 65.830 of the Commission’s rules could be read to require deduction of accrued OPEB liabilities, the Commission held that

“[g]iving rate base recognition to OPEB in Part 65 would constitute a rule change.” RAO 20 Rulemaking ¶ 2.

II. There was no “Gap” in the Commission’s Rules

- Whether or not there is a gap in a rule depends, first and foremost, on the text of the rule. The text of the rule at issue here cannot be read to be anything less than definitive. It says, “[t]he rate base ***shall consist of*** the interstate portion of the accounts listed in § 65.820 . . . , minus any deducted items computed in accordance with § 65.830.” In other words, it says: “***A shall consist of “B” minus “C.”*** There is nothing open-ended about this language. In fact, under the plain language of the rule, if “A” is anything other than “B” minus “C”, the rule is violated.
- Indeed, the Commission’s own prior interpretations of the rule preclude any claim that there was a gap that can be filled in a tariff investigation.
 - Both the *Rescission Order* and the *Order on Reconsideration* state that the Commission’s rules specify what should and should not be in the rate base
 - *Rescission Order* ¶ 25: “Sections 65.820 and 65.830 of our rules ***define explicitly*** those items to be included in, or excluded from, the interstate rate base.”
 - *Both orders*: “The rate base rules, codified at 47 CFR §§ 65.800-830, list the Part 32 accounts that ***are to be included in and excluded from the rate base*** that telephone companies use to calculate their interstate costs.”
 - The *Suspension Order* initiating this investigation also recognized that the rules were dispositive because that order sought comment only on the appropriateness of the LECs’ rate base treatment of OPEBs “***under existing rules.***” Had the Commission believed that there was a gap in the rules, it would have framed the issue more broadly.
- The fact that the accounting rules for OPEBs changed after the Commission promulgated §§ 65.800-65.830 does not create a “gap” in those rules that the Commission can fill through interpretation
 - When the text of a regulation is unambiguous, courts will enforce the plain meaning of the regulation, even if the agency might have adopted a different rule had it considered other facts. *See, e.g. Grider v. Cavazos*, 911 F.2d 1158 (5th Cir. 1990).
- Any claim that there is a gap in the rules would be particularly suspect given that, in its 1986 NPRM, the Commission proposed language that, under its (incorrect) view that OPEBs are a zero-cost source of funds, would have required deduction of OPEBs from the rate base. (2 FCC Rcd 332, App. A (1986))

- The rule the Commission adopted instead – which is the rule that was in place until 1997 -- singled out pensions for deduction, and did not require carriers to deduct any other long-term liability including in Account 4310. (3 FCC Rcd 269, App. B (1987)).

III. The Commission may not change its rules in a tariff investigation.

- In investigating a price cap LEC's tariff, the Commission assesses the tariff against the Commission's *existing rules*.
- Tariff investigations are not the proper proceedings for enacting new rules.
 - *Access and Divestiture Tariff Order*: Explaining that its tariff investigation was "an investigation of the lawfulness of the filed access tariffs and their compliance with our access charge rules" and that "[p]roposals to change or reconsider those rules should be submitted in a new rulemaking petition." 101 F.C.C.2d 911, ¶ 17 n.23 (1985).
 - *Special Access Tariffs Order*: "Section 204(a) are rulemakings of particular applicability," in which the Commission "merely applies the obligations imposed by the statute or previously adopted Commission rules to particular carrier conduct." 5 FCC Rcd 4861, ¶¶ 7-8 (1990).
- The Commission's obligation to apply its existing rules in tariff proceedings is a specific application of the general rule that an "agency must indeed follow its own regulations while they remain in force." *Voyageurs Region Nat. Park Ass'n v. Lujan*, 966 F.2d 424, 428 (8th Cir. 1992).
 - The D.C. Circuit has applied this same rule in reversing a Commission ruling in a tariff investigation.
 - In an earlier investigation of tariff filings involving OPEBs, the court explained that, because the Commission's "criteria for exogenous cost treatment constituted a rule," "the Commission was bound to follow those [criteria] until such time as it altered them through another rulemaking." *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 169 (D.C. Cir. 1994).
 - Therefore, in reviewing the Commission's ruling on the lawfulness of the LEC tariffs, "the key question" was "whether the FCC adhered to those criteria in evaluating the LECs' filings." Because the court "conclude[d] that it did not," it reversed the Commission's ruling. *Id.*
 - In fact, the D.C. Circuit held that, "whatever the intrinsic merits" of the Commission's policy reasons for "rejecting exogenous cost treatment" for OPEBs, "the Commission is free to consider them

as a basis for *amending* its current rule, not for concocting a new rule in the guise of applying the old.” *Id.* at 173.

- AT&T has attempted to distinguish this case on the ground that the Commission did not claim it was exercising rulemaking authority in the tariff investigation at issue. Nothing in the decision, however, suggests that the result would have been different if the Commission had made such a claim. To the contrary, the court’s clear holding, consistent with basic principles of administrative law, is that the Commission *may not* change its rules in a tariff investigation no matter how it packages that rule change.

IV. *Even if the Commission could change its rules in a tariff investigation – and the law is clear that it cannot – it could not do so here because the Suspension Order gave no notice of a possible rule change.*

- Even if the Commission could amend its rule through a tariff investigation, it provided no notice that it was contemplating doing so.
 - Instead, in the order setting the 1996 tariff filings for investigations, the Bureau indicated only that the investigation would determine the lawfulness of the tariffs “under *existing* rules.” Memorandum Opinion and Order, *1996 Annual Access Tariff Filings*, 11 FCC 7564, ¶ 19 (Comm. Carr. Bur. 1996) (emphasis added).

V. *There is no policy justification for requiring SBC to deduct accrued OPEB liabilities from its rate base.*

- No benefit to consumers, just a windfall to IXC’s.
- The assumption that OPEBs are like pensions is incorrect. Accrued pension expense, was recovered in full from ratepayers under rate of return regulation. But the accounting treatment of OPEBs changed after adoption of price caps, and under that regime, SBC did not recover accrued OPEB expense from ratepayers because the Commission denied its request for exogenous cost treatment of such expense. Because OPEBs are therefore not a zero cost source of funds, it would be incorrect from a pure policy perspective to require that OPEB liabilities be deducted from SBC’s rate base.

VI. *Even if the Commission finds – incorrectly – that the tariffs at issue were unlawful, the Commission should exercise its discretion to not to order refunds.*

- It is well established that refunds are a matter of equity and that, in determining whether a refund is warranted, the Commission must “balance the interests of both the carrier and the

customer in determining the public interest,” with “each case ... examined in light of its own particular circumstances.” *American Television Relay*, 67 FCC2d 708-09 at para. 15. See *Public Service Comm’n v. Economic Regulatory Admin.*, 777 F.2d 31, 36 n. 5 (D.C. Cir. 1985).

- The equities counsel against a refund.
 - The Commission has repeatedly characterized the rule in question as not requiring subtraction of accrued OPEB liabilities from the rate base.
 - The premise on which the Commission has concluded that accrued expenses should be deducted from the rate base does not apply here since SBC was denied exogenous cost treatment of its accrued OPEB expense. Requiring SBC nevertheless to deduct this expense that it never recovered from its rate base bestows an unwarranted windfall on IXCs. The Commission’s prior contrary conclusion – supported only by analogy to pensions – ignored the effects of the change from rate of return regulation to price caps.
 - The investigation is 8 years old and was previously dismissed. The Commission is under a statutory obligation to resolve tariff investigations within 5 months.